

Second Circuit Finds Jurisdiction Under ERISA to Decide Insurer's Counterclaim for Overpaid Plan Benefits

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March 14, 2013 -- On March 13, 2013, the United States Court of Appeals for the Second Circuit decided *Thurber v. Aetna Life Insurance Company, et al*, and aligned itself with the First and Third Circuits in holding that the defendant insurer's counterclaim for return of overpaid benefits was an equitable claim for restitution, falling within the scope of ERISA's jurisdiction.

Sharon Thurbur was a participant in her employer's ERISA disability benefits plan, which was insured and administered by Aetna Life Insurance Company. After a car accident, Thurbur was approved for short-term disability benefits. When those benefits ended, Thurbur applied for long-term disability benefits. In her application, she informed Aetna that she had received no-fault insurance payments while on short-term disability. Under the plan, Aetna was entitled, but not required, to reduce benefits in the amount of other income received, including no fault insurance payments. Aetna denied Thurbur's long-term disability claim, finding the medical documentation did not demonstrate she was unable to perform her job functions. After an administrative appeal sustained the denial, she filed a lawsuit challenging the denial in the United States District Court for the Western District of New York. Aetna asserted a counterclaim for equitable restitution of the overpaid short term benefits in the amount of the no fault payments she received while on short-term disability (\$7,213.92).

The district court granted summary judgment to Aetna on Thurbur's denial of benefits claim, but found that Aetna's counterclaim was legal, rather than equitable in nature, and it therefore lacked jurisdiction under ERISA to hear that claim. Thurbur appealed the entry of summary judgment on her benefits denial claim, and Aetna cross-appealed the dismissal of its counterclaim.

The Second Circuit upheld the entry of summary judgment on Thurbur's benefits denial claim, finding that Aetna's decision was not arbitrary and capricious. It then turned to dismissal of Aetna's counterclaim. The court noted that what constitutes "appropriate equitable relief" under 29 U.S.C. § 1132(a)(3) "continues to perplex courts despite efforts by the Supreme Court during the past decade to shed some light in the matter." These efforts were *Sereboff v. Mid Atl. Med. Servs., Inc.* (2006) and *Great-West Life & Annuity Ins. Co. v. Knudson* (2002). The Second Circuit analyzed these cases and found that Aetna's counterclaim was equitable in nature because it sought specific funds in a specific amount, as authorized by the plan, that had been entrusted to Thurber and had been in her possession and control. In so holding, the court recognized the existence of a circuit split on the issue, aligning itself with decisions by the First and Third Circuits, and against one by the Ninth Circuit. The Ninth Circuit, in *Bilyeu v. Morgan Stanley Long term Disability Plan* (2012), held that a similar counterclaim was not equitable in nature because the money being sought was not the actual third party payment, but rather the plan's overpayment in that amount. The *Bilyeu* court also held that where, as in Thurbur's case, the overpayment has dissipated (i.e., the third party payment was spent), the claim is not equitable in nature. The Second Circuit disagreed with the Ninth Circuit, finding that Aetna had an equitable lien in the overpayment, which overcame these formalities. The Second Circuit noted that the distinction between legal and equitable claims is often fine, and "[i]n close cases, our inclination is to favor judicial efficiency by allowing ERISA insurers to bring responsive claims in ongoing federal actions...." As such, the court reversed the dismissal of Aetna's counterclaim and directed the district court to enter judgment in favor of Aetna on that claim.

The jurisdictional issue is ripe for resolution by the Supreme Court. Insurers' ability to counterclaim for benefits

overpayments in benefits litigation is valuable leverage, and the Second Circuit's holding is good news for insurers litigating disputes in that circuit.

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